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The fair-dealing fiduciary rule: a comment on *Barr v Cassels*

In *Barr v Cassels*¹ the Outer House of the Court of Session examined the circumstances in which a transaction between solicitor and client triggers liability for breach of fiduciary duty and the equitable remedy of reduction. In a rather reserved analysis, the court allowed a conflicted transaction to stand even though the client received no independent legal advice and her informed consent was contested. The court reached this decision correctly, by applying the *Aitken*² test and finding that the solicitor did not benefit at the expense of his client, and that there was no evidence that an independent solicitor would not have advised the transaction. The case was a missed opportunity for the court to clarify the extent of the solicitors' common law duty to insist that clients receive independent legal advice before entering into a transaction with their solicitors, and align it with the updated and more demanding statutory practice rules.

A. THE FACTS

James Cassels ("the defender") had acted as solicitor for the Barr family for several years, in a variety of matters. In 2003 the defender assisted Mr Barr in a conveyance of a parcel of land to his daughter, Agnes Barr ("the pursuer"). In 2006 the defender's law firm acted as the pursuer's solicitor in a transfer of the same plot of land from herself to the joint names of the pursuer and defender ("the disposition"). At the same time, the pursuer was sent an advice letter, explaining the substance of the disposition and strongly urging her to seek independent legal advice, accompanied by a waiver letter, to be returned in case she declined to take independent legal advice. Alongside their professional relationship, the pursuer and the defender had been engaged in a romantic relationship, and started a life together in a house built on the land transferred in their joint names. Several years later, the parties separated and in 2015 the defender was granted decree for division and sale of the heritable property. The pursuer filed an action seeking reduction of the disposition on grounds of misrepresentation, negligence and breach of fiduciary duty by the defender.³ She claimed that she was induced into signing the disposition by the defender's misrepresentations,⁴ that the defender was in

¹ [2018] CSOH 79 ("*Cassels*").

² *Aitken v Campbell's Trustees* 1909 SC 1217.

³ *Cassels*, para [126].

⁴ Para [134].

breach of fiduciary duty by placing himself in a position of conflict of interest,⁵ and that no solicitor of ordinary skill and care would have failed to convince the pursuer to seek independent legal advice.⁶ Moreover, she averred that she never intended to convey half of the property to the pursuer,⁷ and she never received or signed the advice and waiver letters.⁸

B. THE COURT DECISION

The court rejected the pursuer's action on all grounds. The case for misrepresentation failed mainly due to the "very serious concerns"⁹ of the court about the credibility of the pursuer and her averments. Lady Wolffe found the pursuer "a largely incredible and unreliable witness"¹⁰ and gave no credit to her statements, unless they corroborated with more reliable evidence.¹¹ The reasons for this included the pursuer's past record of dishonest behaviour¹² and the material disjunctions between her evidence and her pleadings, particularly with regard to her alleged lack of awareness of the disposition¹³ and her claim that her signature on the waiver letter was a forgery.¹⁴ Instead, the court accepted the evidence of Allan Findlay, the solicitor who drafted the advice and waiver letters on behalf of the defender's practice. Findlay confirmed that the letters reflected the defender's instructions, but, due to the passage of time, he could only *assume* that he received back the signed waiver letter.¹⁵ The court could only determine "as a matter of inference" that the pursuer signed the waiver letter and declined to take independent legal advice in full knowledge of the consequences.¹⁶ Factors which contributed to such inference included the parties' common intention to build a dwellinghouse and start a life together.¹⁷ Consequently, given the substantial concerns over the pursuer's credibility and reliability, the court held that there was no misrepresentation from the defender regarding the substance and effect of the disposition.¹⁸ On the matter of

⁵ Para [157].

⁶ Para [161].

⁷ Para [25].

⁸ Para [33].

⁹ Para [132].

¹⁰ Para [133].

¹¹ Ibid.

¹² Para [132].

¹³ Para [132.3].

¹⁴ Para [132.5].

¹⁵ Para [95].

¹⁶ Para [141].

¹⁷ Para [142].

¹⁸ Para [138].

negligence, the court found that there was little evidence to support a contention that no reasonably competent solicitor would have failed to insist that the pursuer seek independent legal advice, or was otherwise bound to refuse to act.¹⁹

Regarding the breach of fiduciary duty claim, the court applied the test in *Aitken v Campbell's Trustees*,²⁰ according to which, when a solicitor deals with a client, the relevant question in establishing liability for breach of fiduciary duty is whether another solicitor would have advised the same transaction, or whether the solicitor would have advised the client to conclude the transaction with a third party.²¹ The court noted, rather cursorily, that there was no evidence that the *Aitken* test was met,²² and that the testimonies of both parties' expert witnesses suggested that the transaction was fair and "pointed strongly away" from a finding of breach of fiduciary duty.²³ In addition, the court clarified that breach of fiduciary duty and professional misconduct may arise from the same factual basis but are separate doctrines which should not be confused or assimilated.²⁴ Finally, Lady Wolffe commented in obiter that, had the pursuer established the case for breach of fiduciary duty, the court would not have granted reduction of the disposition, mainly because the pursuer contributed substantially to the value of the property by financing the building and fitting of the house and contributing his expertise in obtaining the planning permissions.²⁵

C. ANALYSIS

The fiduciary nature of the relation between the pursuer and the defender was not disputed. It is generally agreed that solicitor - client is a *per se* fiduciary relationship,²⁶ where the main elements attracting the incidence of fiduciary duties are presumed to exist. Depending on the element which is regarded as the dominant cause of fiduciary duties, the existence of such duties in the case under review may be questioned. If trust and confidence reposed by the beneficiary or associated with a role are regarded as the most relevant indications of fiduciary

¹⁹ Para [161].

²⁰ 1909 SC 1217

²¹ Ibid, 1227.

²² Para [159].

²³ Ibid.

²⁴ Paras [160]-[161].

²⁵ Para [165].

²⁶ Lionel Smith "Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another" (2014) 130 Law Quarterly Review 608 at 618.

responsibility,²⁷ it cannot be doubted that the defender owed fiduciary duties to the pursuer. He had been the trusted family solicitor for a long time, and, according to the pursuer's testimony, she signed the documents because she trusted him.²⁸ If the most significant indicator of fiduciary responsibility is the presence of decision-making authority over the best interests of the other party,²⁹ the incidence of fiduciary duties in this case is less clear. The authority of the defender and his law firm was confined to the narrow task of implementing the conveyance as explained in the advice letter.³⁰ It is not doubted that some agency relations are of such narrow scope that no fiduciary duties arise.³¹ Although this may have been the case here, both parties and the court worked under the unquestioned assumption that fiduciary duties were owed. Proceeding on that basis, it is clear that the defender was in an actual conflict of interest. He had a personal material interest which posed a risk to his ability to exercise independent professional judgment. Moreover, the sexual relationship with his client, while not a cause of strict liability, could be regarded as a non-pecuniary factor that had the potential to interfere with the reliability of his judgment and thus imperil his fiduciary duty.³²

It is well-established that, when a solicitor breaches the no-conflict rule by buying, selling or transferring property to or from his client, the contract can be reduced at the client's option, unless the solicitor is able to show that "his client's interests were as well protected as if they had been under the charge of an independent solicitor."³³ In *Aitken v Campbell's Trustees*³⁴ Lord President Dunedin stated that transactions between solicitor and client must be submitted to the "strictest scrutiny"³⁵ and allowed only if the following questions could be

²⁷ See eg Laura Macgregor, *The Law of Agency in Scotland* (Edinburgh: W. Green, 2013) at 6-13, 6-15.

²⁸ Para [15].

²⁹ See eg Paul B Miller, "The Fiduciary Relationship" in Andrew Gold and Paul Miller, eds., *Philosophical Foundations of Fiduciary Law* (Oxford: OUP, 2014) 63 at 68; Remus Valsan, "Fiduciary Duties of Credit Brokers: *McWilliam v Norton Finance*" (2016) 21: 1 Edinburgh Law Review 99 at 103.

³⁰ Para [20]. The letter expressly stated that no advice was being offered to the pursuer, and directed the latter to seek independent advice in case of any doubts (ibid).

³¹ Macgregor, note 27 at 6-12 [FN 102]; Valsan, note 29 at 103.

³² This risk was noted by the defender's expert: para [107.2].

³³ *Cleland v Morrison* (1878) 6 R 156 at 172, per Lord Young. See also *Rhodes v Bate* (1866) LR 1 Ch 252 at 257, per Lord Turner; *Barron v Willis* (1902) AC 271 at 276, per Lord Earl of Halsbury; *Rigg (Rigg's Executrix) v Urquhart* (1902) 10 SLT 503 at 504 per Lord Stormonth Darling.

³⁴ 1909 SC 1217.

³⁵ Ibid, 1225.

answered affirmatively: “would another law-agent have advised it, or if the proposition had been made by a third party, would this same law-agent have advised it to his own client?”³⁶ In *Cassels* the court endorsed this test, but did not elaborate on the kind of factual inquiries necessary to determine whether the test is met or not. Instead, it simply noted that, while “[t]here is no evidence to support a finding that the *Aitken* test was met”,³⁷ the experts’ agreement that the disposition was not a gift or transfer at undervalue but one where full consideration was given, was a strong indication that the disposition passed the test.³⁸

The extent of the defender’s duty in response to the pursuer’s waiver of her right to take independent advice was a matter of controversy. While the pursuer’s expert believed that the defender breached his duty of care by failing to insist on the taking of independent advice, which was “the only proper course”,³⁹ Lady Wolffe was of the view that the text of the Solicitors Code of Conduct 2002 (applicable at the time of the disposal) allowed for a more flexible approach. The relevant passage stated that

Where solicitors are consulted about matters in which they have a personal or financial interest the position *should* be made clear to the clients and *where appropriate* solicitors should insist that the clients consult other solicitors.⁴⁰

In her view, the words “where appropriate” and “should” do not necessarily imply that a reasonable solicitor exercising due skill and care would always insist on independent legal advice or abstain from acting.⁴¹ Consequently, she endorsed the opinion of the defender’s expert, according to whom the advice and waiver letters sufficed, given the adequacy of consideration and the parties’ intention to use the property as a family home.⁴²

This interpretation, although justified on the basis of the 2002 Code, is not tenable under the current version of the Code. Section B 1.8 of the 2011 Practice Rules explicitly stipulate that where the solicitor or her practice unit have a personal or financial interest in a matter in which they are consulted, so that they cannot reasonably give independent advice, they “must decline to act and advise the client to seek appropriate advice elsewhere.”⁴³ This unqualified duty to advise the client to seek independent legal advice seemingly aligns Scots law with the English law approach, which “takes it as read that the client must receive

³⁶ Ibid, 1227, referring to *Gillespie & Sons v Gardner* 1909 SC 1053 at 1061-1062, per Lord President Dunedin.

³⁷ Para [159].

³⁸ Ibid.

³⁹ Para [48].

⁴⁰ Para [59], emphasis added.

⁴¹ Para [161].

⁴² Paras [116] and [161].

⁴³ Law Society of Scotland Practice Rules 2011, section B.1.8, “Disclosure of Interest”.

independent advice from a solicitor unconnected with his or her own solicitor, who is in full possession of all material facts known to that solicitor.”⁴⁴ The current version of the Rules highlights that the core concern in a situation of conflict of interest is a risk regarding the solicitor’s ability to exercise independent and unencumbered judgment,⁴⁵ which is a matter that cannot be assessed based on the outcome (fairness) of the conflicted transaction.⁴⁶ This insight applies more generally to the fair-dealing rule binding on all fiduciaries. The true concern of the fair-dealing rule must be linked with the underlying rationale of the no-conflict rule as a whole, and with the principle that only fully informed consent can immunise against liability.⁴⁷

Understandably, the Lord Ordinary limited her analysis to the relevant tests and professional conduct rules applicable at the time of the disposition. At the same time, in light of the disagreements between the parties’ expert opinions, and considering the subsequent development of the Practice Rules as well as the general legal regime applicable to the fiduciary no-conflict and fair-dealing rules, it would have been useful if the court commented, albeit in obiter, on the current common law position on the extent of the solicitors’ duty to insist that their clients obtain independent legal advice or abstain from entering into a conflict of interest transaction.

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⁴⁴ *Longstaff v Birtles* [2001] 1 WLR 470 at 477, per Mummery LJ. See also Bruce Ritchie and Alan Paterson, *Law, Practice and Conduct for Solicitors* (Edinburgh: W. Green, 2014) 8.04.

⁴⁵ For further arguments that this is the main concern of the fiduciary no-conflict rule see Lionel Smith, “Deterrence, Prophylaxis and Punishment in Fiduciary Obligations” (2013) 7 *Journal of Equity* 87 at 98.

⁴⁶ Remus Valsan, “Fiduciary Duties, Conflict of Interest and Proper Exercise of Judgment” (2016) 62:1 *McGill Law Journal* 1 at 31.

⁴⁷ Matthew Conaglen, “Re-Appraisal of the Fiduciary Self-Dealing and Fair-Dealing Rules” (2006) 65:2 *Cambridge Law Journal* 366 at 374.